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United States v. Dixon: The Supreme Court Returns to the Traditional Standard for Double Jeopardy Clause Analysis

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CASE COMMENT

United States v. Dixon: The Supreme Court Returns to the Traditional Standard for Double Jeopardy Clause Analysis*

I. INTRODUCTION

In 1969, the Supreme Court determined that the guarantee against double jeopardy[1] was a "fundamental ideal in our constitutional heritage," and thus held that this protection applied to the States through the Fourteenth Amendment.[2] Even though the Supreme Court has deemed this guarantee "fundamental," it has struggled to set forth a definitive standard to assist lower courts in analyzing potential double jeopardy clause violations. The Supreme Court has also not clearly addressed the underlying policy interests of this protection. In fact, then Justice Rehnquist, writing for the Supreme Court in *Albernaz v. United States*,[3] recognized that the "decisional law" of the Double Jeopardy Clause "is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."[4]

Much of the confusion regarding the identification of the appropriate Double Jeopardy Clause standard concerns the Supreme Court's specification of two competing policy justifications for this protection. In *Blockburger v. United States*,[5] the Supreme Court stated what has been recognized as the "established"[6] or

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1 The Double Jeopardy Clause provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Double Jeopardy Clause embodies three protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

2 Benton v. Maryland, 395 U.S. 784, 794-95 (1969).

3 450 U.S. 333 (1981).

4 *Id.* at 343.

5 284 U.S. 299, 304 (1932), *relying on* Morey v. Commonwealth, 108 Mass. 433, 434 (1871).

6 Brown v. Ohio, 432 U.S. 161, 166 (1977).

"principal"[7] test for determining whether two offenses are the same for double jeopardy purposes. The Supreme Court sought to advance the policy interest of finality: ensuring that a defendant would not be tried or punished twice for the "same offense."[8] In *Green v. United States*,[9] the Supreme Court, though not advocating the use of a specific standard, set forth a more expansive rationale for this guarantee:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[10]

Throughout double jeopardy case law since *Green*, the Justices of the Supreme Court have been divided on whether the *Blockburger* standard advances these policy interests. In 1990, in *Grady v. Corbin*,[11] five Justices agreed that the *Blockburger* standard did not advance the policy reasons set forth in *Green* and thus established a second prong to the traditional *Blockburger* test. Under this prong, courts were required to consider whether the "conduct" underlying the offenses was the same, in which case a subsequent prosecution would be barred.[12]

In 1993, in *United States v. Dixon*,[13] the Supreme Court overruled the *Grady* decision and revived the traditional *Blockburger* standard.[14] However, the Supreme Court continues to disagree

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7 Illinois v. Vitale, 447 U.S. 410, 416 (1980).

8 *See Ex Parte* Lange, 85 U.S. (18 Wall.) 163, 168-69 (1873) ("The common law not only prohibited a second punishment for the same offense, but it went further and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."); United States v. Ball, 163 U.S. 662, 669 (1896) ("The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial"); Grafton v. United States, 206 U.S. 333, 334 (1907); Gavieres v. United States, 220 U.S. 339 (1910).

9 355 U.S. 184 (1957).

10 *Id.* at 187-88.

11 495 U.S. 508 (1990). The five Justices included Justice Brennan, Justice White, Justice Marshall, Justice Blackmun, and Justice Stevens. At the time the *Dixon* decision was handed down, two of the five Justices comprising the *Grady* majority, Justice Brennan and Justice Marshall, had retired.

12 *Id.* at 515-16, 521.

13 113 S. Ct. 2849 (1993).

14 This standard does not require courts to consider whether the "conduct" under-

about the proper scope of the Double Jeopardy Clause protection. This disagreement is apparent by the 5-4 split in the *Dixon* decision. The majority did not address the issue that the *Blockburger* standard does not satisfy the *Green* policy interests, but rather allows for piecemeal litigation.[15] Analyzing the *Dixon* decision, which requires use of the *Blockburger* standard, the Eleventh Circuit stated, "[a]s the test now stands, it is difficult to see many circumstances under which the double jeopardy clause will place any check on a prosecutor who displays a minimum degree of care in crafting indictments."[16]

This Note recognizes the confusion that underlies the application of the Double Jeopardy Clause and sets forth an alternative standard for reconciling the differing policy interests. Part II provides a historical case review of the Supreme Court's Double Jeopardy Clause decisions prior to *Dixon*. Part III analyzes the Supreme Court's most recent decision, *Dixon*, focusing on the Justices' various applications of the *Blockburger* standard, the reasons for overruling *Grady*, and Justice Souter's analysis of why *Grady* should have been upheld. Part IV discusses the status of Double Jeopardy Clause jurisprudence after *Dixon* and addresses some issues which were left unanswered by the *Dixon* decision.

II. REVIEW OF THE DOUBLE JEOPARDY CLAUSE JURISPRUDENCE PRIOR TO *DIXON*

A. The Supreme Court's Early Decisions

When the Supreme Court was confronted with addressing the appropriate Double Jeopardy Clause standard in 1932, it could have interpreted this Fifth Amendment guarantee in a variety of ways. Arguably, the most straightforward application would have been a literal interpretation of the term "same offense,"[17] whereby an acquittal or prior prosecution of a robbery charge, for example, would preclude a subsequent prosecution for that same robbery. The Supreme Court, in *Blockburger*,[18] however, did not

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lying the offenses was the same. Rather, the *Blockburger* standard focuses on whether the statutory elements of the offenses are the same.

15 *See infra* notes 37-40.

16 United States v. Sanchez, 3 F.3d 366, 367 (1993).

17 The Double Jeopardy Clause provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

18 Justice Brennan, writing for the majority in Grady v. Corbin, argued that the *Blockburger* decision concerned and applied only to double jeopardy issues involving multi-

adopt such a literal interpretation of the term, but rather followed a Massachusetts Supreme Court decision which held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[19] Focusing on the statutory elements of the two offenses, the Supreme Court stated that "if each statute requires proof of an additional fact which the other does not," the offenses are not considered the "same offense" under the *Blockburger* test.[20]

Since *Blockburger*, the Supreme Court has expanded the inquiry a court must make when engaging in a Double Jeopardy Clause analysis. In addition to examining the statutory elements of the offenses to determine whether they are the same, as required under *Blockburger*,[21] a court must also consider whether one offense is a lesser included offense of the other.[22] In *Brown v. Ohio*, the Supreme Court applied this lesser included offense analysis to the crimes of joyriding and auto theft:

> Joyriding consists of taking or operating a vehicle without the owner's consent, and auto theft consists of joyriding with the intent permanently to deprive the owner of possession . . . . The prosecutor who has established joyriding need only prove

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ple punishments and not to multiple prosecutions. Grady v. Corbin, 495 U.S. 508, 516-18 (1990). *See infra* notes 36-41. However, the *Blockburger* standard has been used in both contexts, as Justice Scalia documented in *Grady*. *Id.* at 535-36. Furthermore, by overruling *Grady*, the *Dixon* decision eliminated any question that may remain by concluding that courts should apply the "same elements test" in Double Jeopardy cases. *See, e.g.*, United States v. Colon-Osorio, 10 F.3d 41, 45 (1993).

19 Blockburger v. United States, 284 U.S. 299, 304 (1932), *quoting* Morey v. Commonwealth, 108 Mass. 433, 434 (1871). Justice Scalia has provided further insight into the application of this standard: "If it is possible to violate each one without violating the other, then they cannot constitute the '*same* offense.'" *Grady*, 495 U.S. at 529.

20 *Blockburger*, 284 U.S. at 304 (citation omitted); *see also* Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975). In subsequent cases, the Supreme Court has articulated further parameters by stating what the term does not mean: (1) "same transaction," Garrett v. United States, 471 U.S. 773, 790 (1985); *but see* Ashe v. Swenson, 397 U.S. 436 (1970) (Brennan, J., concurring), Waller v. Florida, 414 U.S. 945 (1973) (Brennan, J., dissenting); or (2) "same evidence," *see* Grady v. Corbin, 495 U.S. 508, 521-22 (1990); Dowling v. United States, 493 U.S. 342 (1990). *But see* James K. Gatz, *Grady v. Corbin: A New Approach for Insuring Defendant's Fifth Amendment Rights in Successive Prosecutions for Separate Offenses Arising From An Incident*, 36 ST. LOUIS U. L.J. 769 (1992).

21 *See supra* notes 19-20 and accompanying text.

22 Brown v. Ohio, 432 U.S. 161, 167-68 (1977).

> the requisite intent in order to establish auto theft; the prosecutor who has established auto theft necessarily has established joyriding as well.[23]

The *Brown* Court held that because the lesser offense, joyriding, required no proof beyond that required for the greater offense of auto theft, the two were the "same offense" for purposes of the Double Jeopardy Clause.[24]

Furthermore, under the Supreme Court's decision in *Harris v. Oklahoma*,[25] a court must determine whether one offense is a "species of a lesser-included offense" of the other, thereby expanding the analysis required under *Brown*. In the per curiam decision, the Court found that commission of a stated felony, in this case robbery, was a lesser included offense of the felony murder rule and was thus barred.[26] Three years after this decision, the Court, in *Illinois v. Vitale*, interpreting *Harris*, stated: "[W]e did not consider the crime generally described as felony murder as a separate offense distinct from its various elements. Rather, we treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a *species of a lesser-included offense*."[27] Thus, in addition to examining the statutory elements of the offenses to determine whether they are the same, a court under *Brown* and *Harris* must also analyze whether one offense is a lesser or greater included offense or a species of a lesser included offense of the other.

In addition to interpreting the *Harris* decision, the Supreme Court considered in *Vitale* whether, under the Double Jeopardy Clause, a conviction for failure to reduce speed to avoid an accident barred a subsequent prosecution for involuntary manslaughter.[28] The *Vitale* Court established that: "[t]he *mere possibility* that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution."[29] Although it ultimately held that the second prosecution was not barred, the *Vitale* Court, in dictum, also alluded to

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23 *Id.*

24 *Id.*

25 433 U.S. 682 (1977).

26 *See infra* notes 89-93 and accompanying text for Chief Justice Rehnquist's discussion of *Harris*.

27 Illinois v. Vitale, 477 U.S. 410, 420 (1980) (emphasis added).

28 *Id.* at 412.

29 *Id.* at 419 (emphasis added).

a situation where the *Blockburger* inquiry would not suffice, in which case a court would also be required to consider a defendant's conduct:

> [I]t may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for *conduct* that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be *substantial* under Brown [v. Ohio] and our later decision in Harris v. Oklahoma.[30]

The Supreme Court subsequently applied this language to reach its holding in *Grady v. Corbin.*

B. Grady v. Corbin—*The Departure from the Traditional* Blockburger *Standard*

The Supreme Court in 1990 adopted a two prong standard for determining whether two offenses are the same for purposes of the Double Jeopardy Clause. In *Grady,*[31] Corbin drove his automobile over the double yellow line and struck a second vehicle, killing one person and seriously injuring another. Corbin was issued two traffic citations, one for driving while intoxicated and the other for failing to keep right of the median.[32] Corbin pleaded guilty to the traffic tickets and was sentenced to a $350 fine, a $10 surcharge, and a six-month license revocation.[33] Two months later, a grand jury indicted Corbin on five charges.[34] The bill of particulars specified that the State intended to use three acts as evidence for the five charges: driving while intoxicated, failing to keep right of the median, and driving too fast for the inclement weather conditions.[35] Because he had previously been convicted and sentenced for two of the acts, Corbin subsequently filed a motion to dismiss on double jeopardy grounds.[36]

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30 *Id.* at 420 (emphasis added, citations omitted).

31 Grady v. Corbin, 495 U.S. 508 (1990).

32 *Id.* at 511.

33 *Id.* at 513.

34 The charges were reckless manslaughter, second-degree vehicular manslaughter, criminally negligent homicide for causing the death of Brenda Dirago, third degree reckless assault for causing physical injury to Daniel Dirago, and driving while intoxicated. *Id.*

35 *Id.* at 513-14.

36 *Id.* at 514.

In reaching its decision to establish a two prong standard, the *Grady* Court determined that the *Blockburger* test would not further the policy interests set forth in *Green*.[37] Writing for the majority,[38] Justice Brennan stated that the *Blockburger* decision applied only to cases involving multiple punishments,[39] because multiple prosecutions raised different concerns which the *Blockburger* standard could not and did not address.[40] In addition, Justice Brennan asserted that the *Blockburger* standard would allow for subsequent prosecutions of offenses which had different statutory elements but the same conduct.[41] Specifically, with regard to Corbin's case, Justice Brennan stated:

> If *Blockburger* constituted the entire double jeopardy inquiry in the context of successive prosecutions, the State could try Corbin in four consecutive trials: for failure to keep right of the median, for driving while intoxicated, for assault and for homicide. The State could improve its presentation of proof with each trial, assessing which witnesses gave the most persuasive testimony, which documents had the greatest impact, and which opening and closing arguments most persuaded the jurors.[42]

Thus, the Supreme Court adopted the language in *Vitale*[43] and applied a two prong standard.

Under the *Grady* standard, a court was required to first apply the traditional and expanded version[44] of the *Blockburger* test, focusing on whether the statutory elements of the two offenses were the same.[45] If a court determined that the offenses were indeed the same, the subsequent prosecution would be barred. Under the second prong of the *Grady* standard, a court was required to consider whether if, "to establish an essential element of an offense

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37 *Grady*, 495 U.S. at 518-19; *see supra* note 10.

38 The Supreme Court was closely divided on this issue - the decision was 5-4. For the discussion regarding Justice Scalia's dissenting opinion, *see infra* notes 101-08 and accompanying text.

39 For a discussion on the "multiple punishment doctrine," *see* Kenneth G. Schuler, *Continuing Criminal Enterprise, Conspiracy, and the Multiple Punishment Doctrine*, 91 MICH. L. REV. 2220, 2222-32 (1993).

40 *Grady*, 495 U.S. at 518-19.

41 *Id.* at 520-21.

42 *Id.* (citations omitted).

43 *See supra* note 30.

44 For a discussion concerning the expanded version of the *Blockburger* standard, *see supra* notes 21-27 and accompanying text.

45 *See supra* notes 19-20 and accompanying text.

charged in that prosecution, [the government] will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[46] Applying this standard in Corbin's case, the Supreme Court concluded that although the crimes did not constitute the "same offense" under *Blockburger*, the subsequent prosecution was barred under the application of the second prong of the *Grady* standard.[47] Specifically, the *Grady* Court reached this conclusion because the State conceded that, as in the first prosecution, the same conduct, namely driving while intoxicated and failing to keep right of a median, would have been used to convict Corbin in the second prosecution.[48]

Several lower courts had difficulty applying the two prong standard set forth in *Grady*. For example, in *Ladner v. Smith*,[49] the Fifth Circuit interpreted the second prong of the *Grady* standard as requiring "much more than a mere search for congruity of conduct."[50] The Fifth Circuit adopted a four-step analysis for analyzing the facts of a case under the second prong of *Grady*:

> (1) Identify each essential element of the offense with which the defendant is charged in the second prosecution.
> (2) Determine what conduct of the defendant the state proposes to prove to establish each essential element identified in step one.
> (3) Examine the conduct determined in step two to see if, in and of itself, such conduct constitutes one or more separate and distinct offenses for which a person could be prosecuted.
> (4) Determine whether, in the first prosecution, the defendant was in fact prosecuted for one or more of the separate and distinct offenses found in step three.[51]

In addition, Justice Scalia, writing for the majority in *Dixon*, provided several cases to prove that courts have had difficulty in applying the *Grady* two prong standard.[52]

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46 *Grady*, 495 U.S. at 521. This language looks to "what conduct the State will prove, not the evidence the State will use to prove that conduct." *Id.*

47 *Id.* at 522-23.

48 *Id.*

49 941 F.2d 356 (5th Cir. 1991).

50 *Id.* at 361.

51 *Id.* at 362.

52 United States v. Dixon, 113 S. Ct. 2849 (1993). Justice Scalia cited: Vives v. United States, 113 S. Ct. 497 (1992); Sharpton v. Turner, 964 F.2d 1284, 1287 (2d Cir. 1992); United States v. Calderone, 917 F.2d 717 (2d Cir. 1990); United States v. Prusan, 780 F. Supp. 1431, 1434-36; State v. Woodfork, 239 Neb. 720, 725 (1991); Eatherton v. State, 810 P.2d 93, 99, 104 (Wyo. 1991). *Dixon*, 113 S. Ct. at 2864 n.16.

Furthermore, two years after *Grady* was decided, the Supreme Court, in *United States v. Felix*,[53] recognized an exception to the "same conduct test." Felix manufactured methamphetamine in Oklahoma in violation of various federal statutes.[54] Following a DEA raid, Felix moved his operation to Missouri and ordered chemicals and equipment from a DEA informant. Felix was arrested, tried, and convicted for the offense of attempting to manufacture methamphetamine in Missouri.[55] During the trial in Missouri, the government, in accordance with Rule 404(b) of the Federal Rules of Evidence,[56] introduced evidence of the Oklahoma operation to prove Felix's state of mind. Subsequently, the government charged Felix and five others with conspiracy to manufacture, possess, and distribute methamphetamine in Oklahoma, along with several substantive drug offense charges.[57] The government introduced much of the same evidence at the trial in Oklahoma that was previously introduced at the trial in Missouri. Although Felix was convicted in the lower court, the Tenth Circuit, relying on *Grady*, concluded that a Double Jeopardy Clause violation had occurred and thus reversed the lower court's decision.[58] Chief Justice Rehnquist, applying the decision of *Dowling v. United States*,[59] determined that the introduction of prior acts as evidence was permitted under Rule 404(b).[60] In addition, the Supreme Court recognized two exceptions to the *Grady* principle, namely that (1) a substantive crime and conspiracy to commit that crime are not the "same offense,"[61] and that (2) the lesser in-

53 112 S. Ct. 1377 (1992).

54 *Id.* at 1379.

55 *Id.* at 1380.

56 "Evidence of prior acts is admissible to prove 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'" FED. R. EVID. 404(b).

57 United States v. Felix, 112 S. Ct. 1377, 1380-81 (1992).

58 *Id.* at 1381.

59 493 U.S. 342 (1990). Dowling was charged with bank robbery, armed robbery, and other crimes under Virgin Islands law for allegedly stealing over $12,000 from the First Pennsylvania Bank. *Id.* at 344. As Dowling fled the scene, an eyewitness saw his face and was later able to identify Dowling as the robber. At trial, the government introduced a witness who testified that she was robbed two weeks prior to the bank robbery. During the robbery, she unmasked the intruder and was able to identify him as Dowling. Dowling, however, was acquitted of this charge. *Id.* at 344-45. On the basis of the Double Jeopardy Clause, Dowling objected to the introduction of that evidence of the robbery in the subsequent prosecution. The Court held that the introduction of this evidence to show identity was permissible under Rule 404(b). *Id.* at 348-49.

60 *Felix*, 112 S. Ct. at 1383.

61 *Id.* at 1383-84.

cluded offense analysis applied only in the context of a single course of conduct, not multilayered conduct.[62]

III. THE REVIVAL OF THE TRADITIONAL "SAME ELEMENTS" STANDARD

In *United States v. Dixon*,[63] the Supreme Court reviewed the applicability of the "same conduct test" as established in *Grady*.[64] In the first of two consolidated cases, Dixon was arrested and charged with second-degree murder. Under the terms of his release, Dixon was prohibited from committing any criminal offense.[65] Dixon was subsequently arrested and indicted for possession of cocaine with intent to distribute, thereby violating the terms of his release order. Convicted of contempt, Dixon was sentenced to 180 days in jail.[66] Based upon double jeopardy grounds, Dixon subsequently moved for and was granted dismissal of the count charging possession of cocaine with intent to distribute.[67]

In the second case, Ana Foster obtained a civil protection order against her husband requiring that he not "molest, assault, or in any manner threaten or physically abuse" her.[68] Ana subsequently filed three separate contempt motions alleging that her husband had committed three separate threats and two assaults in violation of the civil protection order.[69] Although he was acquitted of the alleged threats, Foster was convicted of simple assault and sentenced to 600 days in jail.[70] A later indictment charged

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62 *Id.* at 1385. *See also* Iannelli v. United States, 420 U.S. 770, 777-79 (1975); Garrett v. United States, 471 U.S. 773, 778 (1985), United States v. Deshaw, 974 F.2d 667 (5th Cir. 1992). Many federal appellate courts have adopted a five part totality of the circumstances test for determining whether two offenses are the same in the context of conspiracy cases. The five factors include: "(a) the time during which the activities occurred; (b) the persons involved in the two conspiracies; (c) the places involved; (d) whether the same evidence was used to prove the two conspiracies; and (e) whether the same statutory provision was involved in both conspiracies." United States v. Garcia-Rosa, 876 F.2d 209, 228-29 (1st Cir. 1989); United States v. Jarvis, 7 F.3d 404, 410-11 (4th Cir. 1993); United States v. Dortch, 5 F.3d 1056, 1061 (7th Cir. 1993).

63 113 S. Ct. 2849 (1993).

64 *See supra* notes 44-48 and accompanying text.

65 *Dixon*, 113 S. Ct. at 2853. Failure to follow the release order would result in the "revocation of [his] release, an order of detention and prosecution for contempt of court." *Id.*

66 *Id.*

67 *Id.*

68 *Id.* at 2853-54.

69 *Id.*

70 *Id.*

Foster with simple assault (Count I), threatening to injure another (Counts II through IV), and assault with intent to kill (Count V).[71] Like Dixon, Foster filed a motion to dismiss, contending that the second prosecution would constitute a Double Jeopardy Clause violation. The district court denied this motion.[72]

On appeal, the District of Columbia Court of Appeals consolidated the two cases and applied the two prong standard set forth in *Grady*. The court held that a subsequent prosecution in either case would violate the Double Jeopardy Clause.[73] The Supreme Court granted certiorari to determine "whether the Double Jeopardy Clause bars prosecution of a defendant on substantive criminal charges based upon the same conduct for which he previously has been held in criminal contempt of court."[74]

A. *Part III-A of the* Dixon *Decision*[75]

In addressing this issue, Justice Scalia, writing for the majority, purported to apply *Grady's* two prong standard. Under the first prong, namely the traditional *Blockburger* test,[76] the Supreme Court analyzed whether the criminal contempt charges[77] and the substantive acts constituted the "same offense." With regard to Dixon and Count I of Foster's case, the Supreme Court relied upon its prior decision in *Harris*, where it specified that "'the crime generally described as felony murder' is not 'a separate offense distinct from its various elements.'"[78] Applying this language to Dixon's case, Dixon was forbidden under the terms of his release order to commit any criminal offense, thereby making any subsequent violation of the governing criminal code an element of the offense of contempt.[79] Justice Scalia, writing for the majority, stated that Dixon's substantive crime, possession of cocaine with intent to distribute, was a "species of a lesser-included

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71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 Justice Scalia was joined by Justice White, Justice Stevens, Justice Kennedy and Justice Souter.

76 *See supra* notes 19-20 and accompanying text.

77 Justice Scalia determined that criminal contempt, "at least the sort enforced through nonsummary proceedings, is 'a crime in the ordinary sense.'" *Dixon*, 113 S. Ct. at 2856 (quoting Bloom v. Illinois, 391 U.S. 194, 201 (1968)).

78 *Id.* at 2857 (quoting *Vitale*, 447 U.S. at 420-21).

79 *Id.*

offense" of violating his release order.[80] Likewise, the Supreme Court concluded that in Foster's case, the charge of simple assault underlying the subsequent prosecution was "based on the same event that was the subject of his prior contempt conviction . . . ."[81] Justice Scalia refused to consider the differing policy interests underlying prosecution of criminal contempt and the charged substantive acts.[82] Instead, he relied upon the text of the Fifth Amendment "which looks to whether the *offenses* are the same, not the interests that the offenses violate."[83] Therefore, the Supreme Court held that the Double Jeopardy Clause barred the subsequent prosecution of the substantive offenses in both cases.

In his opinion, concurring in part and dissenting in part,[84] Chief Justice Rehnquist disagreed with Justice Scalia's application of the *Blockburger* standard to Dixon's case and to Count I in Foster's case. In critiquing Justice Scalia's application of the *Blockburger* standard, Chief Justice Rehnquist stated, "[i]t is somewhat ironic, I think, that Justice Scalia today adopts a view of double jeopardy that did not come to the fore until after *Grady*, a decision which he (for the Court) goes on to emphatically reject

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80 *Id.* The Government relied upon *In Re* Debs, 158 U.S. 564, 594 (1895), for the contention that "it attempted to exclude certain nonsummary contempt prosecutions from various constitutional protections for criminal defendants . . . ." Justice Scalia concluded that *Debs* was not controlling because Bloom v. United States, 391 U.S. 194 (1968), overruled that decision. *Id.*

81 *Dixon*, 113 S. Ct. at 2858.

82 *Id.* Justice Blackmun, in his opinion concurring in part and dissenting in part, stated:

> The purpose of contempt is not to punish an offense against the community at large but rather to punish the specific offense of disobeying a court order. . . . Contempt is one of the very few mechanisms available to a trial court to vindicate the authority of its orders. I fear that the Court's willingness to overlook the unique interests served by contempt proceedings not only will jeopardize the ability of trial courts to control those defendants under their supervision but will undermine their ability to respond effectively to unmistakable threats to their own authority and to those who have sought the court's protection.

Id. at 2880. For a discussion of the differing policy interests between contempt of court and the substantive acts, see *The Supreme Court– Leading Cases*, 107 HARV. L. REV. 144 (1993).

83 *Dixon*, 113 S. Ct. at 2858. Justice White, joined by Justice Stevens and Justice Souter as to Part I, stated that Justice Scalia did not adequately address the differing policy interests which underlie a prosecution for contempt and a prosecution for a substantive offense. Although he provides a detailed analysis regarding these conflicting concerns, Justice White ultimately agrees with Justice Scalia that the underlying offenses, not the interests, should be the basis for the Court's decision. *Id.* at 2869-74.

84 Justice O'Connor and Justice Thomas joined Chief Justice Rehnquist.

as 'lack[ing] constitutional roots.'"[85] Chief Justice Rehnquist argued that the "same elements test" required consideration "not on the terms of the particular court orders involved, but on the elements of contempt of court in the ordinary sense."[86] To obtain a conviction of contempt of court, the State must show (1) a court order was made known to the defendant and (2) a willful violation of that order occurred.[87] Neither of the substantive offenses in the two cases, possession of cocaine with intent to distribute or simple assault, "necessarily satisfied" the two elements which the State must prove to obtain a conviction of contempt. Thus, according to Chief Justice Rehnquist, a proper application of the *Blockburger* standard would have revealed that both the contempt charge and the substantive offenses required proof of an additional element which the other did not.[88]

Furthermore, Chief Justice Rehnquist questioned Justice Scalia's reliance on *Harris*,[89] a case recognized as not having full precedential value,[90] for the proposition "that *Harris* somehow requires us to look to the facts that must be proven under the particular court orders in question (rather than under the general law of criminal contempt) in determining whether contempt and the related substantive offenses are the same for double jeopardy purposes."[91] According to Chief Justice Rehnquist, the *Harris* Court concluded that Oklahoma's felony murder statute required proof of some felony as one of the elements. The *Harris* Court construed this requirement as being any of the felonies which

85 *Dixon*, 113 S. Ct. at 2866.

86 *Id.* at 2865.

87 *Id.* at 2866. This differs from the analysis that Justice Scalia applied with regard to Counts II through V in Foster's case; *see infra* notes 95-100 and accompanying text.

88 *Dixon*, 113 S. Ct. at 2868.

89 *See supra* notes 25-27.

90 Chief Justice Rehnquist recognized that *Harris* was "a summary reversal" which "'does not enjoy the full precedential value of a case argued on the merits.'" *Dixon*, 113 S. Ct. at 2866 (quoting Connecticut v. Doehr, 111 S. Ct. 2105, 2113 n.4 (1991)). In addition, Chief Justice Rehnquist stated, "[t]oday's decision shows the pitfalls inherent in reading too much into a 'terse *per curiam*.'" *Id.* The First Circuit questioned the import of *Harris* after the *Dixon* decision: "Harris' status is unclear. The Supreme Court in *Grady* had pointed to *Harris* to support its argument that *Blockburger* was not the exclusive test to vindicate the Double Jeopardy Clause's protection against multiple prosecutions. The *Dixon* Court overruled this proposition, holding that both multiple prosecutions and multiple punishment cases are to be assessed under the identical standard, *Blockburger's* 'same elements' test." United States v. Colon-Osorio, 10 F.3d 41, 45 (1st Cir. 1993).

91 *Dixon*, 113 S. Ct. at 2867.

could be used to obtain a felony murder conviction.[92] However, in Dixon's case, for example, the applicable criminal contempt statutes did not include a "generic reference" which "incorporate[d] the statutory elements of assault or drug distribution."[93] Thus, as *Harris* is distinguishable from *Dixon*, Justice Scalia should not have used the *Harris* decision to reach the result in Dixon's case that the substantive offenses should have been barred from subsequent prosecution.

B. Part III-B of the Dixon *Decision*[94]

As for Counts II through V in Foster's case, the Supreme Court noted that to prove a double jeopardy violation Foster's attorney would be required to show knowledge of a civil protection order and a willful violation of one of its conditions.[95] Under the civil protection order, Foster was forbidden to "molest, assault or in any manner threaten or physically abuse his wife."[96] Justice Scalia contended that Count V, assault with intent to kill, required proof of an additional element, namely intent to kill, which was not required to prove simple assault.[97] Similarly, to obtain a conviction of Counts II through IV, the applicable statute required specific proof of "a threat to kidnap, to inflict bodily injury, or to damage property;" a conviction of contempt required that Foster be shown to have threatened Ana in any manner.[98] Moreover, conviction of contempt required proof that Foster willfully violated the civil protection order, whereas the statute underlying Counts II through IV did not.[99] The Supreme Court held that Counts II through V contained an additional element which was not required to prove contempt of court, and therefore did

92 *Id.*

93 *Id.*

94 Chief Justice Rehnquist, Justice Blackmun, Justice O'Connor, Justice Scalia, Justice Kennedy, and Justice Thomas joined this portion of the opinion.

95 *Dixon*, 113 S. Ct. at 2867. Justice Scalia did not take the same approach for analyzing Dixon's case or Count I in Foster's case. *See supra* notes 76-83. Chief Justice Rehnquist contended that Justice Scalia looked to "the facts that must be proven under the particular orders in question (rather than under the general law of criminal contempt) . . . ." *Id.* at 2867.

96 *Id.* at 2854.

97 *Id.* at 2858-59.

98 *Id.* at 2859.

99 *Id.*

not constitute the "same offense" under the *Blockburger* test and accordingly the first prong of the *Grady* standard.[100]

Justice Scalia then proceeded to apply the second prong of the *Grady* standard. Although the Supreme Court recognized that Counts II through V would have been barred under the second prong, the Supreme Court refused to uphold the two prong standard of *Grady* and allowed subsequent prosecution of these counts. Justice Scalia asserted that the so-called "same conduct test" lacked constitutional roots and was thus overruled.[101] In reaching this decision, Justice Scalia recognized that subject to two[102] departures, the *Blockburger* decision articulated the "established" Double Jeopardy Clause standard.[103] Unlike the *Blockburger* test, Justice Scalia found neither historical support, nor case precedent for the "same conduct test."[104] Justice Scalia questioned Justice Brennan's position set forth in *Grady* that, as originally suggested in dictum in *Vitale*,[105] the appropriate standard should require consideration of the defendant's conduct.[106] Furthermore, Justice Scalia stated that the decision in *Dowling* "foreclosed" the subsequent holding that the majority in *Grady* reached.[107] Relying on *Dowling*, Justice

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100 *Id.*

101 Justice Scalia was joined by Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy and Justice Thomas. *Id.* at 2860. In *Dixon*, Justice Scalia deferred to his dissenting opinion in *Grady* for his explanation of why the "same conduct test" should not be upheld.

102 Justice Scalia acknowledged two exceptions to the *Blockburger* standard. The first exception "occurs where a statutory offense expressly incorporates another statutory offense without specifying the latter's elements." Grady v. Corbin 495 U.S. 508, 528 (1990); *see, e.g.*, Harris v. Oklahoma, 433 U.S. 682 (1977). The second exception, articulated in Ashe v. Swenson, 397 U.S. 436, 443 (1970), occurs "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." However, further exceptions have been articulated: "An exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence." *See* Brown v. Ohio, 432 U.S. 161, 169 n.7, (quoting Diaz v. United States, 223 U.S. 442, 448-49 (1912)).

103 Justice Scalia based this conclusion not only on the text of the Fifth Amendment which utilizes the term "same offense," not "same conduct," but also on historical evidence. Justice Scalia's historical analysis considered Britain's double jeopardy jurisprudence and the subsequent adherence to this rule within the early American cases. "Thus, the *Blockburger* definition of 'same offense' was not invented in 1932, but reflected a venerable understanding." *Grady*, 495 U.S. at 535.

104 United States v. Dixon, 113 S. Ct. 2849, 2860 (1993).

105 *See supra* note 30.

106 Grady v. Corbin, 495 U.S. 508, 520-21 (1990).

107 *Id.* at 538.

Scalia recognized that "conduct establishing a previously prosecuted offense was relied upon, not because that offense was a statutory element of the second offense, but only because the conduct would prove the existence of a statutory element."[108]

C. *Justice Scalia's Critique of the Pro-*Grady *Dissent*

In his opinion, concurring in part and dissenting in part, Justice Souter set forth historical case law as support for *Grady's* "same conduct" standard. First, Justice Souter looked to *In Re Nielsen*[109] to support his argument that *Blockburger* was not the sole standard for analyzing alleged double jeopardy violations.[110] Justice Souter focused on the *Nielsen* Court's language that "where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense."[111] Justice Souter interpreted "incidents" to mean "acts," and thus reasoned "that a defendant 'cannot be tried a second time' for a single act included as one of the 'various incidents' of a continuous crime for which he has already been convicted."[112] Furthermore, Justice Souter stipulated that the *Nielsen* Court had not simply applied a lesser included offense analysis, for if that analysis had in fact been applied, the *Nielsen* Court would have reached the opposite conclusion.[113] Instead, Justice Souter contended that "the Court was adopting the very different rule that subsequent prosecution is barred for any charge comprising an act that has been the subject of prior convic-

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108 *Id.* at 538-39. *See also* Justice O'Connor's dissent stating that the *Grady* decision is "inconsistent" with both the *Dowling* decision and the Federal Rules of Evidence, specifically Rule 404(b). *Id.* at 524-26 (O'Connor, J., dissenting).

109 131 U.S. 176 (1889). Nielsen was charged with cohabitation during the period from October 15, 1885 through May 13, 1888, in violation of a federal antipolygamy law. *Id.* Nielsen pleaded guilty to the charge and subsequently served a three month prison term and paid a $100 fine. *Id.* at 177. Nielsen was then charged with committing adultery on May 14, 1888, which he contended was barred under the Double Jeopardy Clause. In *Dixon*, Justice Souter interpreted the issue underlying the *Nielsen* case as "whether double jeopardy applies where a defendant is first convicted of a continuing offense and then indicted for some single act that the continuing offense includes." United States v. Dixon, 113 S. Ct. 2849, 2885 (1993) (Souter, J., dissenting).

110 *Dixon*, 113 S. Ct. at 2884.

111 *Id.* at 2885 (quoting *In re* Nielsen, 131 U.S. 176, 188 (1889)).

112 *Id.*

113 *Id.* at 2885-86.

tion."[114] In response, Justice Scalia claimed that reliance on the term "incidents" as meaning acts was misplaced because "incidents" had instead been defined as meaning "elements."[115] In addition, Justice Scalia asserted that the *Nielsen* Court had, in fact, applied the proposition that prosecution of the greater offense bars a subsequent prosecution of the lesser offense.[116]

Second, Justice Souter, claiming that the *Brown* Court relied on the *Nielsen* decision, set forth the *Brown* decision to support the conclusion that "the *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense."[117] The *Brown* Court further stated: "Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first."[118] However, Justice Souter's reliance on this footnote is misplaced. The Supreme Court in *Ashe* recognized this simply as an exception to the *Blockburger* standard.[119] Justice Scalia specifically noted that the *Brown* Court acknowledged that *Nielsen* was "the first Supreme Court case to endorse the Blockburger rule."[120]

Third, Justice Souter set forth *Harris* to support his argument that the "same conduct test" should be upheld. Justice Souter initially acknowledged that the *Harris* Court applied a lesser included offense analysis to determine that the petitioner could not be prosecuted for the lesser crime of robbery with firearms after being convicted of the greater crime of murder.[121] However, Jus-

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114 *Id.* at 2886.

115 *Id.* at 2860-61. Justice Scalia stated, "What it obviously means, however, is 'element.' See Black's Law Dictionary 762 (6th ed. 1990) (defining 'incidents of ownership'); J. Bouvier, Law Dictionary 783-784 (1883) (defining 'incident' and giving examples of 'incident to a reversion,' and 'incidents' to a contract). That is perfectly clear from the very next sentence of Nielsen (which Justice Souter does not quote): 'It may be contended that adultery is not an incident of unlawful cohabitation . . . .' [*Nielsen*], 131 U.S. at 189." *Dixon*, 113 S.Ct. at 2861 n.10.

116 *Dixon*, 113 S. Ct. at 2860-61.

117 Brown v. Ohio, 432 U.S. 161, 166-67 n.6 (1976).

118 *Id.*

119 The *Ashe* Court incorporated the doctrine of collateral estoppel within the Double Jeopardy Clause. *See supra* note 102.

120 "The greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense included in it. This conclusion merely restates what has been this Court's understanding of the Double Jeopardy Clause at least since *In re* Nielsen was decided in 1889." *Brown*, 432 U.S. at 168 (1976).

121 *Dixon*, 113 S. Ct. at 2887 (quoting Harris v. Oklahoma, 433 U.S. 682, 682-83

tice Souter went on to state that the court "justified that conclusion in the circumstances of the case by quoting *Nielsen's* explanation of the *Blockburger* test's insufficiency for determining when a successive prosecution was barred."[122] From this, Justice Souter concluded that both the *Nielsen* and *Harris* Courts relied on the defendant's conduct to reach their decisions that the subsequent prosecution must be barred.[123] In response, Justice Scalia asserted that the *Harris* Court did not mention the word conduct in its opinion but rather focused on the elements of the offenses: "[t]o prove felony murder, 'it was necessary for all the ingredients of the underlying felony' to be proved."[124] Although this statement was correct, Justice Scalia interestingly did not apply it as to Dixon's case and Count I in Foster's case.[125]

Fourth, Justice Souter set forth the dictum of *Vitale*,[126] which the *Grady* Court made binding precedent. According to Justice Souter, the *Vitale* Court recognized *Harris* as a departure from the traditional *Blockburger* standard, in that a court was also required to consider conduct.[127] To this, Justice Scalia simply replied that the Supreme Court's language regarding conduct was merely a suggestion in *Vitale*, nothing more: "No Justice, the Vitale dissenters included, has ever construed this passage as answering, rather than simply raising, the question on which we later granted certiorari in Grady."[128] The *Vitale* Court, according to Justice Scalia, simply applied a lesser/greater included offense analysis.

Justice Souter's argument that the *Grady-Vitale-Harris-Nielsen* line of cases represented over 100 years of case law advocating the use of a "same conduct standard" was historically misplaced.[129] As Justice Scalia recognized, the standard for making determinations as to whether a double jeopardy clause violation has occurred requires a court to consider the statutory elements of the applicable offenses.[130]

(1977)).

122 *Id.*

123 *Id.* at 2888.

124 *Id.* at 2861 (quoting *Harris*, 433 U.S. at 683 n.1).

125 *See supra* notes 76-88 for a discussion on the elements of the offenses with regard to Dixon's case and Count I in Foster's case in his opinion, concurring in part/dissenting in part.

126 *See supra* note 30.

127 *Dixon*, 113 S. Ct. at 2887-88.

128 *Id.* at 2861-62.

129 *Id.* at 2891.

130 *See supra* notes 19-20.

IV. LINGERING QUESTIONS

The *Dixon* Court overruled *Grady's* two prong standard and returned to the traditional *Blockburger* test for Double Jeopardy Clause analysis.[131] Accordingly, courts must focus on the statutory elements of the offenses charged within separate prosecutions and determine whether they constitute the "same offense."[132] However, courts, relying on the *Dixon* decision for guidance may face difficulty in properly applying this standard. Specifically, with regard to Dixon's case and Count I in Foster's case, Justice Scalia looked to the facts underlying the contempt orders rather than the statutory elements of the offense of contempt, as required under the *Blockburger* standard. Justice Scalia thus determined that the substantive acts, possession of cocaine with intent to distribute and simple assault, constituted the "same offense" as the crime of contempt.[133] In finding that the charge of contempt of court was a "species of a lesser included offense" of the substantive act,[134] Justice Scalia appears to have focused on the underlying conduct of the offenses. This analysis is surprising because Justice Scalia went on to overrule the "same conduct test" set forth in *Grady*.[135] If the "same elements test" had been strictly applied, Justice Scalia would have determined that the substantive acts and the contempt charges required proof of an additional fact which the other did not. The subsequent prosecutions for the substantive acts in both

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131 In his dissenting opinion in *Grady*, Justice Scalia documented the roots of the *Blockburger* standard in English common law and several early American cases. Grady v. Corbin, 495 U.S. 508, 530-36 (1990). *See also* Gavieres v. United States, 220 U.S. 338 (1911), Burton v. United States, 202 U.S. 344 (1906), Morey v. Commonwealth, 108 Mass. 433 (1871), Commonwealth v. Roby, 12 Pickering 496 (Mass. 1832). *But see* United States v. Dixon, 113 S. Ct. 2849, 2885-86, 2888-90 (1993) (Justice Souter criticizes Justice Scalia's reliance on *Gavieres, Burton* and *Morey*). Furthermore, the Supreme Court in each of its major Double Jeopardy Clause decisions has recognized *Blockburger* as the established standard, *see supra* notes 6-7, subject to a few well-acknowledged exceptions:
(1) "An exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence"; Brown v. Ohio, 432 U.S. 161, 169 n.7 (1977) (quoting Diaz v. United States, 223 U.S. 442, 448-49 (1912)); (2) the doctrine of collateral estoppel as set forth in Ashe v. Swenson, 397 U.S. 436, 443 (1970). *Brown* and Harris v. Oklahoma, 433 U.S. 682 (1980) "expand" the *Blockburger* inquiry.

132 *See supra* note 1.

133 *Dixon*, 113 S. Ct. at 2857-58.

134 *Id.*

135 *Id.* at 2860.

Dixon's case and Count I in Foster's case thus should not have been barred, as Chief Justice Rehnquist stated in his concurring in part/dissenting in part opinion.[136] With regard to Counts II through V in Foster's case, Justice Scalia did, in fact, focus on the statutory elements of the offense of contempt and concluded that the subsequent prosecution was not barred because the substantive acts and the crime of contempt did not constitute the "same offense."[137] Therefore, for an example of the proper application of the *Blockburger* standard, courts should look to Chief Justice Rehnquist's opinion with regard to Dixon's case and Count I in Foster's case, and to Justice Scalia's opinion regarding Counts II through V in Foster's case.[138]

In addition, the question remains as to whether the policy interests set forth in *Blockburger* or *Green* are to be given effect in a double jeopardy case. The *Green* factors could simply be considered an extension of the *Blockburger* interest in finality. However, use of the *Blockburger* standard does not guarantee that piecemeal litigation will not occur, as demonstrated in the *Grady* decision. In

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136 For Chief Justice Rehnquist's recognition and proper application of the traditional *Blockburger* standard with regard to these counts, see *supra* notes 84-88 and accompanying text.

137 United States v. Dixon 113 S. Ct. 2849, 2858-60 (1993).

138 Thus far, courts have had little difficulty in applying the *Blockburger* standard which was revived by the *Dixon* Court. *See, e.g.*, United States v. Colon-Osorio, 10 F.3d 41 (1st Cir. 1993); Steele v. Young, No. 93-7004, 1993 U.S. App. LEXIS 31683 (10th Cir. Dec. 8, 1993); United States v. Welch, No. 92-1368, No. 92-1370, 1993 U.S. App. LEXIS 34029 (1st Cir. Dec. 30, 1993); United States v. Sanchez, 3 F.3d 366 (11th Cir. 1993); United States v. Adams, 1 F.3d 1566 (11th Cir. 1993); United States v. Frayer, 9 F.3d 1367 (8th Cir. 1993).

The state courts remain split as to the proper standard to apply in a double jeopardy case. Even though the United States Supreme Court overruled the *Grady* decision in *Dixon*, the Supreme Court of Hawaii chose to keep the "same conduct test" as the proper standard for double jeopardy analysis. Hawaii v. Lessary, No. 15679, 1994 Haw. LEXIS 3 (Haw. Jan. 10, 1994). However, the Supreme Court of Wisconsin followed the *Dixon* decision and utilized the traditional "same elements test" set forth in *Blockburger*. Wisconsin v. Kurzawa, No. 92-0926-CR, 1994 Wisc. LEXIS 6 (Wis. Jan. 12, 1994). In her concurring opinion, Justice Abrahamson recognized that "double jeopardy jurisprudence is in disarray":

> The double jeopardy clause in the federal constitution has become encrusted with numerous conflicting decisions and interpretations. The 5-4 Dixon decision, which overruled a 5-4 decision rendered barely three years earlier, produced five opinions with the justices joining and rejecting various portions of each other's opinions. When it requires a chart to determine which paragraphs of a United States Supreme Court decision constitute the law of the land, you know you are in trouble.

Id. at *37 (Abrahamson, J., concurring).

that case, Justice Brennan revealed that if the Supreme Court had applied the *Blockburger* standard, Corbin would have been subject to four separate prosecutions.[139] Arguably, after *Dixon*, the outcome presented by Justice Brennan in the *Grady* decision remains possible because the *Dixon* Court did not address the problem of piecemeal litigation which the *Blockburger* standard allows.

If the Supreme Court wanted to maintain the policy interests set forth in *Green*,[140] an alternative standard would need to be adopted. Justice Brennan has suggested a "same transaction test" for analyzing potential Double Jeopardy Clause violations.[141] Under this test, the prosecution would be required to "join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction."[142] Justice Brennan stated that this test would "best promote[] justice, economy and convenience,"[143] and would further the policy interests set forth in *Green*.[144] In addition, Justice Brennan stated that "[t]he Constitutional protection against double jeopardy is empty of meaning if the State may make 'repeated attempts' to touch up its case by forcing the accused to 'run the gauntlet' as many times as there are victims of a single episode."[145]

As support for the "same transaction test," Justice Brennan relied on the language of the Federal Rules of Criminal Procedure and the Federal Rules of Civil Procedure. Both liberally promote the joinder of parties and/or claims in a single trial.[146] For example, Rule 8(a) of the Federal Rules of Criminal Procedure provides for the joinder of charges that are similar in character, or arise from the same transaction or from connected transactions or from part of a common scheme or plan.[147] This standard protects a defendant's interest in not being subjected to "embarrassment, expense and ordeal" and not being "compell[ed] to live in a continuing state of anxiety and insecurity."[148]

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139 Grady v. Corbin, 495 U.S. 508, 520 (1990).

140 *See supra* note 10.

141 *See* Ashe v. Swenson, 397 U.S. 436, 453-60 (1970).

142 *Id.* at 453-54.

143 *Id.* at 450, 454.

144 *See supra* note 10.

145 *Swenson*, 397 U.S. at 459.

146 1 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE, CRIMINAL 2D §141 (1982 & Supp. 1993).

147 FED. R. CRIM. P. 8(a).

148 Green v. United States, 355 U.S. 184, 187-88 (1957).

Despite Justice Brennan's focus on defining a standard which properly addresses the policy concerns set forth in *Green*, the Supreme Court has "steadfastly refused to adopt the same transaction test."[149] Justice Scalia has stated that although "the same transaction test is rational and easy to apply,"[150] the Fifth Amendment concerns relitigation of the "same offense," not the "same transaction."[151] Therefore, even though the "same transaction standard," unlike the *Blockburger* standard, would address the *Green* policy interests, the Supreme Court will probably not adopt that standard.

V. CONCLUSION

The Double Jeopardy Clause provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."[152] In *Dixon*, the Supreme Court determined that this guarantee requires courts to apply the traditional *Blockburger* standard, i.e. the "same elements" test. Under this standard, courts must determine whether the statutory elements of the offenses are the same, as well as consider whether one offense is a lesser included offense or a species of a lesser included offense of the other. By returning to the *Blockburger* analysis, the Supreme Court adopted the narrow view of the Double Jeopardy Clause protection. As the test now stands, a defendant has no constitutional right to have all of the potential charges joined in a single prosecution, but rather may be subject to the "embarrassment, expense, and ordeal" of several prosecutions. Until the Supreme Court reconciles the differing policy interests which were set forth in *Blockburger* and *Green*, the "most intrepid judicial navigator"[153] will continue to be forced to wade through this sea of confusion.

Kathryn A. Pamenter

149 Garrett v. United States, 471 U.S. 773, 790 (1985).
150 Grady v. Corbin, 495 U.S. 508, 543 (1990) (Scalia, J., dissenting).
151 *See supra* note 1.
152 U.S. CONST. amend. V.
153 *See supra* note 4.